IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1172~~ 71

UNITED STATES OF AMERICA ex rel.
JAMES P. CARAFAS,

Petitioner,

—against—

HON J. EDWIN LA VALLEE,

Warden of Auburn Prison, Auburn, New York
(Successor to Hon. Robert E. Murphy),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CALLY & CALLY

By: JAMES J. CALLY
Attorney for Petitioner
150 Broadway
New York, N. Y. 10038
WOrth 4-5781

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No.

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Warden of Auburn Prison, Auburn, New York
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, James P. Carafas, respectively prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on February 21, 1967, affirming the order of the United States District Court for the Northern District of New York, which affirmed the jury conviction of the Petitioner for the crimes of Burglary third degree and Grand Larceny second degree. These judgment were affirmed in the Appellate Division, Second Department of the State of New York, with no opinion, 14 A.D. 2d 886 and the Court of Appeals of the State of New York, thereafter affirmed with no opinion, 11 N. Y. (2d) 891. Remitter of that Court was

amended to show the unreasonable search and seizure question was presented and passed upon. Certiorari was denied in 372 U.S. 948. The Petitioner served his time in prison and is now at liberty and living in New York City. The Federal procedure of habeas corpus was invoked, and the matter came before Mr. Justice Foley of the United States District Court for the Northern District of New York.

On May 6, 1966 the said United States District Court for the Northern District of New York denied the said application. Thereafter, the Petitioner petitioned the United States Court of Appeals for the Second Circuit to appeal forma pauperis. The said Appellate Court denied the application and dismissed the appeal with no opinion. The Petitioner thereupon moved for reargument and the same was denied with no opinion.

Opinions Below

The opinion of the Federal District Court for the Northern District of New York (Appellant's Appendix pp. 10-18) was written by District Judge James T. Foley denying the petition of habeas corpus of the petitioner. The opinion of the District Court is printed in the Appendix hereto. Appendix A, infra, pp. 8 et seq., is not yet reported.

Questions Presented

1. Whether the Detectives, without a warrant of arrest, were authorized to arrest and take into custody the Petitioner herein, or, whether this arrest was a subterfuge for the unlawful search and seizure that followed it?

2. Whether there was a reasonable ground for the exclusion of certain evidence which was allowed into the record by the trial judge over the appellant's objections denying them due process of law under the Fifth Amendment, and whether or not the appellant received a fair and impartial trial?

3. Whether the Court of Appeals erred in affirming the lower court's ruling depriving the appellant of his constitutional rights under the Fourth and Fourteenth Amendments and Federal Rules of Criminal Procedure, concerning the proceeding of habeas corpus?

4. Whether the State of New York Courts erred in not applying the principle enunciated in *Mapp* v. *Ohio*, 367 U.S. 643, when this case was appealed from the lower court, as the said principle had already become the law of the land?

5. Whether the Petitioner is entitled to appeal a decision of the lower court, although the Court of Appeals has denied him the right to entertain such appeal forma pauperis?

Statutes Involved

The pertinent portions of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution (Appendix 19-21), and Statutes Involved (Appendix B, *infra*, pp. 19-21).

Statement of the Case

The Detectives Grim and Kaples of Nassau County acting on a complaint of an Oceanside land developer, to wit: that furniture in his model home had been stolen, began their investigation.

The said detectives ascertained from neighbors in that community that on June 3, 1959 a Cadillac with an enclosed trailer had been stuck, and necessitated the assistance of a tow truck. Upon learning the identity of the Tow Truck Operator, they gathered the information that led them to the home of the petitioner in Astoria, New York.

On arriving at the home of the Petitioner, the Detectives noticed a two story residential dwelling with a basement area. The Street floor was rented to a doctor, with entrance through a vestibule used in common with the Petitioner; all the other part of the premises was the private and personal dwelling of the Petitioner.

Alongside the entrance to the building were push bells listing clearly the names of the Occupants. One for the doctor and the other for the Petitioner. Both were in good working order. In the vestibule was another push button bell for the occupant upstairs. The detective merely pressed the doctor's bell, and on inquiry were told that Carafas lived upstairs.

The detectives thus mounted and ascended the stairway leading to the Petitioner's private domain. They began searching. They pushed the Petitioner aside. The Petitioner's wife was handcuffed to the bathroom door. Although they had been requested to show their authority, none was availing. At this point they claimed certain furniture in the apartment, claimed it to have been stolen, and they arrested the Petitioner and his wife, who is not a part of this application.

Thereafter, began a series of Appellate Reviews in the State Courts, and while this matter was pending in the Appellate Division for the Second Department of the Su-

preme Court of the State of New York, that Court refused to recognize the principle that the fruits of an unlawful search cannot be availed of under our Constitution.

After the exhaustion of the State Remedial aspects, the Petitioner turned to the Federal Courts for assistance. Of course, a gambit of Federal Courts Procedures became involved, until finally the District Court for the Northern District of New York entertained the application of the Petitioner. The District Court ruled against the Petitioner; whereupon he appealed to the Court of Appeals for the Second Circuit—application in forma pauperis. This was denied on February 3, 1967. A petitioner for reargument met the same fate, being denied on February 21, 1967. The Court of Appeals denied the right of the Petitioner to appeal although the filing of the notice of Appeal was duly performed pursuant to rules and statutes promulgated therefor.

Reasons for Granting Writ

1. The decision below should be reviewed because the constitutional issues raised were completely disregarded by the detectives, all in violation of the Fourth Amendment of the Constitution (see: *Gatlin* v. *U.S., C.A.D.C.*, 1963, 326 F. 2nd 666; *Staples* v. *U.S., C.A. Fla.*, 1963, 320 F. 2nd 817; *Mallory* v. *U.S.*, App. D.C. 1957, 77 S. Ct. 1356, 354 U.S. 449; *Mapp* v. *Ohio*, 367 U.S. 643.)

2. The grounds for making an arrest when the detectives first entered the stairway were lacking; and without apprising the Petitioner of their entry into his domain, they then became trespassers, since they had no legal justification. (See *McDonald* v. *United States*, 355 U.S.

451; *People* v. *Barton*, 18 A.D. 2nd 612 (New York Reports), New York Penal Code, Section 2036.) Therefore, the fruits of the detectives' search, by reason of the illegal invasion of the private property became inadmissible in a court of law. (See *Silverthorne* v. *U.S.*, 251 U.S. 385; *Johnson* v. *U.S.*, 333 U.S. 10.)

It thus became apparent that the Fourth and Fourteenth Amendments were violated by the Trial Court. The Court in allowing the fruits of the poisonous tree to enter the record, and moreover, compounding the error by additionally allowing the entry into evidence of some 25 photographs of furniture which allegedly was the representation of the missing furniture.

The Court of Appeals in denying appeal forma pauperis, went a step further, and denied the right of appeal to the Petitioner. Although the District Court recognized that perhaps its decision should be reviewed. The matter was further complicated by the District Court, in that although it had the minutes of the trial of the State Court, it required a hearing. At the hearing, the disparity of the testimony of the Detectives became more apparent, since the testimony given at the hearing was diverse from that given some six years earlier in the trial court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

CALLY & CALLY, ESQS.

By: James J. Cally
Attorney for Petitioner
150 Broadway
New York, N. Y. 10038

APPENDIX A

Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. JAMES P. CARAFAS,

Petitioner-Appellant,

—against—

HON. J. EDWIN LAVALLEE, Warden of Auburn State Prison, Auburn, New York,

Respondent-Appellee.

Before:

MOORE and FRIENDLY, *USCJJ;* BRYAN, *USDJ.*

PETITION FOR REHEARING

Petition denied.

L. P. M.
H. J. F.
U.S.C.J.J.

Fv.P.B.
U.S.D.J.

February 21, 1967

Application for Leave to Proceed in Forma Pauperis

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. JAMES P. CARAFAS,

Appellant-Petitioner,

—v.—

HON. J. EDWIN LAVALLEE, Warden of Auburn Prison, Auburn, New York, (Successor to HON. ROBERT E. MURPHY),

Appellee-Respondent.

Before:

MOORE and FRIENDLY, *USCJJ;* BRYAN, *USDJ.*

Application denied. Motion to dismiss appeal granted.

L. P. M.
H. J. F.
U.S.C.J.J.

Fv.P.B.
U.S.D.J.

February 3, 1967

Memorandum—Decision and Order

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

Civil No. 9657

UNITED STATES OF AMERICA ex rel. JAMES P. CARAFAS,

Petitioner,

—against—

HON. J. EDWIN LAVALLEE, Warden of Auburn Prison, Auburn, New York, (Successor to HON. ROBERT E. MURPHY),

Respondent.

Appearances:

JAMES P. CARAFAS, Petitioner in Person,

LAWRENCE W. McKEOWN
Attorney for Petitioner
114 Old Country Road
Mineola, N. Y.

HON. LOUIS J. LEFKOWITZ
Attorney General, State of New York
Attorney for Respondent
The Capitol
Albany, N. Y.

BARRY MAHONEY
Asst. Attorney General
New York City, N. Y.

JOSEPH R. CASTELLANI
Asst. Attorney General
Albany, N. Y.
(Of Counsel).

Memorandum—Decision and Order

JAMES F. FOLEY, D. J.

This petitioner and his wife, the latter not a party in this habeas corpus proceeding, were convicted after trial by jury verdict in Nassau County, New York, in November of 1960, of the crimes of Burglary third degree and Grand Larceny second degree. In November 1960, the wife was sentenced to concurrent terms of 1½-5 years, and on December 13, 1960 petitioner was sentenced to concurrent terms of 3-5 years. These judgments of convictions were affirmed, no opinion. (14 A.D. 2d 886, 1961). The Court of Appeals, New York, affirmed, no opinion. (11 N.Y. 2d, 891, 1962). Remittitur of that Court was amended to show the unreasonable search and seizure question was presented and passed upon. (N. Y. 2d, 969, 1963). Certiorari was denied in 372 U.S., 948, 1963).

Then, the federal procedure of habeas corpus was invoked. No matter the diplomatic camouflage in judicial language to describe it as a proceeding other than one of review in reality federal habeas corpus is automatically the next appellate step of review of state criminal convictions on federal constitutional grounds. It is so considered and freely used by the state prisoners. (Fay v. Noia, 372 U.S. 391; Townsend v. Sain, 372 U.S. 293). The petitioner was confined to Auburn State Prison in the Northern District of New York, when he filed his habeas corpus petition in this Court. I denied it in a reported decision without prejudice, ruling that in view of the unsettled state of the law in New York on the question of failure to object at the trial when photographs of the furniture involved in the theft were offered and received, he should reapply to the Appel-

late Division, Second Department, and Court of Appeals, New York, for reconsideration. (231 F. Supp. 533, 1963; see also Henry v. Mississippi, 379 U.S. 443). It is not clear in the record how it was managed, and probably is unimportant, but the petitioner did follow my suggestion and went back to the New York Courts, but apparently at the same time appealed to the Court of Appeals, Second Circuit. There was no further presentation to me by the petitioner after the State Appellate Court denials for reargument. The next ruling was by the Court of Appeals, Second Circuit, reversing my denial, qualified as one without prejudice to renewal and remanding the issues of unreasonable search and seizure to me for determination. (334 F.2d 331, 1964). New York obtained a st ▼ of the mandate and a combined petition for certiorari was filed in this proceeding and in two others with similar questions and was denied. (381 U.S. 951, 1965). The Court of Appeals, Second Circuit, in this case and in Angelet v. Fay, 337 F. 2d 12; aff'd. 381 U.S. 654, commented that the failure to object in New York before the Mapp v. Ohio ruling, (367 U.S. 643, June 19, 1961), would be futile and not a waiver. (See Henry v. Mississippi, 379 U.S. 443; Nelson v. California, 9 Cir., 346 F.2d 73; Fay v. Moia, supra, pg. 439).

This marathon of state and federal review is not yet ended. The complication that caused confusion in this case, as in many others, was that the trial was held before Mapp, and Linkletter v. Walker, 381 U.S. 618, settling the retroactivity of Mapp, did not come until June 1965. Fortunately, the long delay is not as serious as in some instances because the petitioner was paroled October 4, 1964 from con-

finement. Attorney McKeown, who had represented Carafas in the trial where the conviction here challenged was rendered, also at a suppression of evidence hearing before Nassau County Judge Kelly in 1962 on another Nassau County indictment charging similarly the burglary and larceny of model home furniture, and on the State appeals, volunteered to appear for him in the next steps in this proceeding to be taken upon the remand. The Court of Appeals left it to my discretion as to the need for hearing. However, Assistant Attorney General Mahoney, who handled the federal appeals for New York, and Attorney McKeown, thought a hearing should be held, and accordingly, one was held in Albany on November 5, 1965. The hearing was expedited by the attorneys who had the important witnesses Carafas, his wife and the two detectives, first reaffirm their testimony given at the State trial in 1960 and before Judge Kelly at the 1962 hearing relevant to the incidents that happened at the Carafas home in June 1959, and are important to be weighed in the determination of the search and seizure issue. Several of the witnesses at the hearing before me did testify to some further extent and exhibits were introduced to throw further light upon the physical factors present where the arrest, search and seizure were made.

As a result of this spendid cooperation by the lawyers, and I am sincere about the effort, a substantial record was speedily submitted and must be canvassed for decision. The State trial record submitted is one of 1181 pages; the record of hearing before Judge Kelly in August, 1962, is 164 pages; the transcript of hearing before me in 1965 is 81 pages. Even to those with little habeas corpus experience on the

front line a burdensome task of review should be evident. I shall refer, when necessary, as the attorneys have done in their excellent briefs, to the State trial record by "Tr.", to the minutes of the hearing before County Judge Kelly by "M.", and to the hearing before me by the symbol "T". The State records shall be filed with the Clerk of this Court, Federal Post Office Building, Utica, N. Y., with this decision.

With full realization of the seriousness of any criminal charges upon which conviction causes imprisonment, there is noted in the background of our situation here in the necessary search for probable cause one Keystone Comedy aspect. Nassau County Detectives Grim and Kapler investigated on the same morning the burglary of a model home in Oceanside, Long Island, that took place during the early morning hours of June 3, 1959. In their investigation they were taken through the model home and had described to them the pieces of furniture stolen (T. 28, 44). They spoke to one particular neighbor in the case who gave the amazing information that she saw an AAA Truck come in the early morning hours when the burglary was taking place and pull out of the sand by the model home a black and gray Cadillac, with a U-Haul trailer attached, carrying New Hampshire license plate. (M. 84, T. 45). She described the appearance of the man and woman in the car. The detectives located the tow truck operator who pulled the car and trailer out, and they learned through him that the person who was assisted gave his name as James Carafas, 3553—30th Street, Astoria, apparently a duly accredited member of AAA (M. 85-86, T. 45-46). This information led the detectives to the Astoria address on June 3, 1959, where they testified

they saw the Cadillac and trailer with the New Hampshire plate parked in front of the two-story house (M. 142, T. 26, 46; Resp. Ex. A).

This is the critical juncture where the entry into the house and the search and seizure of the furniture must be examined. The legal guide lines for decision give no fixed formula to ascertain probable cause when, as here, arrest is made without an arrest warrant, and search without a search warrant (U.S. v. Rabinowitz, 339 U.S. 56). It is emphasized that we must be mindful we deal with probabilities and must search for the practical considerations of everyday life on which reasonable and practical men, not legal technicians, act. (Brinegar v. U.S., 338 U.S. 160, 175). What constitutes "reasonableness" or "probable cause" must depend upon the specific facts of each case. (U.S. v. Elgisser & Gladstein, 2 Cir., 334 F.2d 103, 109). It should be noted that New York concedes the photographs of the furniture introduced at the trial would be subject to the same illegality taint as if the furniture had been offered as exhibits.

My canvass of the record inclines me to the version of events, and there are always inconsistencies and differences, given by Detectives Kapler and Grim as to their entry into the building and the subsequent happenings that led to the arrest of Carafas, as they testified, on the second floor landing adjacent to the second floor apartment occupied by him and his wife. I find that the outside and inside doors leading to Dr. Shapiro's office on the first floor were unlocked. (T. 47). This finding is supported by the testimony of Doctor Shapiro before County Judge Kelly that the doctor had unlocked the doors himself on this particular day. The

doctor further testified he was present in his office between the hours of 1-2 P.M., an dheard the commotion upstairs of arrest and search by the detectives.. (M. 52-64). I accept as true the testimony of the detectives that the doctor's sign outside had the visiting hours for patients thereon and also that they inquired of a woman in the doctor's office as to the Carafas residence and were told "upstairs". I also accept as credible from the records and the testimony before me that one detective shouted "Carafas" from the bottom of the stairs, and Carafas came voluntarily to the landing to identify himself; that on the second floor landing at the top of the stairs as they looked up the steps and ascended the detectives could see a dresser corresponding to the description of the stolen furniture. (T. 41-42, 48). I also find that the detectives placed Mrs. Carafas under arrest in the open archway of the Carafas apartment. (M. 146-147; T. 49, 69-70). These findings, of course, reject the version of entry into and arrest inside the apartment given by petitioner and his wife. I find the search was made shortly after announcement of arrest, and that the furniture seized and removed was that taken from the model home at Oceanside, and the photographs introduced at the trial were only of that particular furniture. (M. 147-148, T. 49). There may be wonderment concerning the ruling of County Judge Kelly contrary to the one I reach. However, it is clear in my judgment from the opinion of the Judge that the basis for his ruling was that the furniture, involved in another indictment concerning a Bethpage, Long Island, burglary, was removed from a locked basement room the day after the petitioner's arrest.

Of course, as in all these situations, there are doubts when general principles of the governing case law are sought to be applied to particular facts. It is true the arrest and search might better have been made with arrest and search warrants. Also, no one disputes that the fairest way to enter a domicile is to ring the bell in the vestibule under that person's card. But under the circumstances here of landlord and tenant, Carafas being the landlord and the Doctor the tenant, in separate floors with common open doors for entry, as I find, and no breaking or force, such entry should not be characterized, in my opinion, unlawful under the cases as I read them. (Polk v. U.S., 9 Cir., 314 F.2d 837; cert. den. 375 U.S. 844; Schnitzer v. U.S., 8 Cir., 77 F.2d 233; Rouda v. U.S., 2 Cir., 10 F.2d 916; Hobson v. U.S., 8 Cir., 226 F.2d 890; U.S. v. Monticallos, 2 Cir., 349 F. 2d 80).

If the search did precede the arrest, and I do not so find, still I would think it must be considered nearly simultaneous and involving one transaction. (Holt v. Simpson, 7 Cir., 340 F.2d 853, 856; Johnson v. U.S., 333 U.S. 10; U.S. v. Boston, 2 Cir., 330 F.2d 937, 939; U.S. v. Devenere, 2 Cir., 332 F.2d 160). There is no doubt in my mind after the unusual revelations of preliminary investigations probable cause much more than mere suspicion led the detectives to the Carafas' home. In no sense could I conclude the persons who had charge of the model home and described the furniture to the detectives, and the neighbor who gave the information of the car and trailer should be treated as informers. At the house the sighting of the dresser was enough to warrant belief that the petitioner was connected with the burglary. (Henry v. U.S., 361 U.S. 98, 102). The attorney for the petitioner earnestly argues, and it is worthy of serious

consideration, that under the circumstances there was no emergency presented by reasonable fear of escape or removal of the furniture, and the detectives should have obtained the magistrate's search warrant. This procedure is and should be much preferred. (Johnson v. U.S., 333 U.S. 10, 15; Miller v. U.S., 357 U.S. 301, 307). The relevant test, however, is not whether it is reasonable to secure a search warrant but whether the search was reasonable. (U.S. v. Rabinowitz, 339 U.S. 56, 64-65). It is my conclusion the arrest was lawful although without a warrant, as one made with probable cause in accord with New York statutes, and the search and seizure was incident to such lawful arrest and therefore not unreasonable. (Ker v. California, 374 U.S. 23, 34; N. Y. Code Crim. Proc., Sec. 177(3); People v. Adorno, 37 Misc. 2d, 36)?

My findings of fact and conclusions of law are stated above. As done in my decisions of the West and Wilson companion cases remanded, to anticipate, I hereby issue a certificate of probable cause (28 U.S.C.A. 2253). A notice of appeal, if forwarded to the Clerk of this Court, Federal Building, Utica, N. Y., shall be filed by the Clerk without payment of prescribed fee. Application for leave to appeal generally in forma pauperis should be directed to the Court of Appeals, Second Circuit.

The petition, being entertained on the merits for the first time in this District Court, is denied and dismissed for the second time.

It is So Ordered.

Dated: May 2, 1966
Albany, N. Y.

James T. Foley
United States District Judge

APPENDIX B

Statutes

Constitutional Amendments

Amendment IV—Searches and Seizures

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes

Amendment XIV—Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions, and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.